

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Writ Petition No.2346 of 2006

Shri Suresh Ramchandra Jadhav ..Petitioner

vs.

No one ..Respondent

Shri S.M.Kamble for petitioner.

CORAM: S.B.MHASE J.
7th April, 2006

P.C.

1. Heard the learned Counsel for the petitioner.
2. The order passed by the District Judge on 8th February, 2006 below Civil Misc.Application No.34 of 2006 is challenged before this Court.
3. The Misc.Application No.36 of 2004 was filed by the present petitioner under sec.276 of the Indian Succession Act in order to obtain the probate of the Will dated 5th September, 2000 executed by Bhagubai Shripati Ahire who expired on 11th December, 2000. Briefly stated that except the petitioner who claims the property by testamentary succession there is no heirs of the deceased Bhagabai who can claim the said property by intestated succession. The said application was dismissed on 16th June, 2005 since no one was remaining present to prosecute the said application on behalf of the petitioner and since no steps were taken and for want of prosecution the application was dismissed. Thereafter on 6th February, 2006 composite application was preferred under Order IX Rule 9 read with sec.141 for restoration of Misc.Application No.36 of 2004. The petitioner also

preferred another application bearing No.34 of 2006 making the prayer that the delay caused in preferring application under Order IX Rule 9 be condoned. It appears that at the preliminary stage the objection was raised as to under which provision the said application is tenable and since no objection is pointed out at the preliminary stage the application for condonation of delay was rejected. Therefore, the present petition.

4. The Misc.Application No.36 of 2004 filed by the petitioner for getting the probate of the Will dated 5th September, 2000 executed by Bhagabai Shripati Ahire is a Miscellaneous judicial proceedings under the Indian Succession Act. Section 141 of the Code of Civil Procedure provide that procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any court of civil jurisdiction. The explanation provides that "in this section, the expression "proceedings" includes proceedings under Order IX, but does not include any proceeding under Article 226 of the Constitution. Therefore, Misc.Application no.36 of 2004 which was being considered by the District Judge was a civil proceeding and in view of provisions of section 141, the provisions of the Code of Civil Procedure were applicable. In the result, Order IX of the Code of Civil Procedure was applicable to the said proceedings and, therefore, the order for non prosecution was passed by the Court. In view of these circumstances, the petitioner was entitled to invoke the

provisions of order IX rule 9 for restoration of the said application and if there is delay in making such an application, the provisions of section 5 of the Limitation Act can be very well invoked and delay condonation application was permissible. It may be possible that the learned counsel who argued the matter before the learned District Judge may not be well equipped with the provisions but it was obligatory for the District Judge to find out which of the provisions are applicable and thereafter to dispose of the application. Surprisingly, application for restoration in title clause itself it is mentioned that the application has been preferred under Order IX rule 9 read with section 141 of the Code of Civil Procedure and, therefore, it is rather difficult to say that the learned counsel who appeared before the District Judge was ill equipped so far as the provisions are concerned. But what I find that in casual manner the application has been disposed of without application of mind and looking to the provisions of the Indian Succession Act. The order dated 8th February, 2006 is hereby quashed and set aside. Since the application is rejected on a preliminary ground the said application is restored to file of the District Judge, Raigad who is further directed to decide Civil Misc.Application No.34 of 2006 being application under sec.5 of the Indian Limitation Act to condone the delay in preferring the application under Order IX rule 9 of the Code of Civil Procedure and thereafter decide the said application on merits. With these directions, the petition is disposed

of .

(S.B.MHASE J.)